Supreme Court, U.S.
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No. 00-577

In the Supreme Court of the United States

UNIVERSITY OF CINCINNATI, *et al.*, Petitioners,

v.

JOHN B. JOHNSON, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The First Amendment and Title VII issues in the petition merit review and are properly presented.

I. The First Amendment question presents a clear and acknowledged circuit split.

The petition's first question is whether *Pickering v. Board of Education*, 391 U.S. 563 (1968), calls for case-by-case balancing when a high-level officer of a public agency is dismissed for disagreeing with the agency about its policies. In petitioners' view, the categorical approach taken in *Branti v. Finkel*, 445 U.S. 507 (1980), rather than case-by-case balancing, should apply in this context.

Respondent asserts that the courts of appeals are not divided over this question. But the courts themselves expressly acknowledge such a split. As the Seventh Circuit has put it, "[t]he circuits disagree about the relationship between the *Pickering/Connick* cases and the *Elrod/Branti* cases." *Marshall v. Porter County Plan Commission*, 32 F.3d 1215, 1220 (7th Cir. 1994).

Other opinions are equally clear. *See, e.g., McEvoy v. Spencer*, 124 F.3d 92, 102 (2d Cir. 1997) ("Although some courts have suggested that a dispositive policymaker exception also exists in the *Pickering* context . . . we reject such a position.") (citations omitted); *Lewis v. Cowen*, 165 F.3d 154, 162-163 (2d Cir. 1999) ("Where the discharge is based on discrete incidents of speech rather than political affiliation, *Pickering*, not *Branti* and *Elrod*, provides the appropriate framework of analysis. To the extent that the Ninth Circuit[ ] . . . supports a contrary view, we have rejected that view."); *Wilbur v. Mahan*, 3 F.3d 214, 219 (7th Cir. 1993) (rejecting the Eleventh's Circuit's view that "the *Elrod* and *Pickering* lines of cases cannot be combined"). *See also Warzon v. Drew*, 60 F.3d 1234, 1238 (7th Cir. 1995) (confirming the

Seventh Circuit's "categorical" rule that "[o]nce the employee is classified as confidential or policymaking, he can be fired on political grounds even if there is no evidence that he would not serve his political superiors loyally and competently") (internal quotation omitted);[1] *Flynn v. City of Boston*, 140 F.3d 42, 47 (1st Cir. 1998) ("where the employee is subject to discharge for political reasons under the *Elrod* and *Branti* cases, a superior may also—without offending the First Amendment's free speech guarantee—consider the official's substantive views on agency matters in deciding whether to retain the official in a policy related position").[2]

Johnson's failure to perceive this clear conflict rests upon a misconception of the *Branti*-like categorical rule and its relationship to the *Pickering* balancing test. Johnson says (Opp. 17-18) that there is no conflict because all the courts that adopt the *Branti*-like rule are actually engaging in balancing. But "wholesale" balancing that results in adoption of a categorical rule for all cases involving high-level policy disputes is very different from "ad hoc" balancing that evaluates the strength of the government's interests in each case involving a high-level policy dispute.

Moreover, this distinction between "ad hoc" and "wholesale" balancing (which is also called "definitional balancing") is well recognized in First Amendment

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[1] Contrary to Johnson's suggestion (Opp. 19), the Seventh Circuit has not renounced its holding in *Warzon*. The hiring case on which Johnson relies, *Bonds v. Milwaukee County*, 207 F.3d 969, 978 (7th Cir. 2000), cites *Hall*, *Flynn*, and *Warzon*, to make clear that its decision does not undercut its *Branti*-derived categorical rule for dismissal cases. *Id.*

[2] Commentators likewise have long recognized the circuit conflict on this First Amendment question. *See* Craig Singer, *Conduct and Belief: Public Employees' First Amendment Rights to Free Expression and Political Affiliation*, 59 U. Chi. L. Rev. 897, 898 (1992); James Kimmell, Jr., *Politics and the Non-Civil Service Public Employee: A Categorical Approach to First Amendment Protection*, 85 Colum. L. Rev. 558, 563-65 (1985).

jurisprudence, as is the need to balance competing considerations before adopting a categorical rule for a certain class of speech-related cases. *See generally* Gerald Gunther & Kathleen Sullivan, First Amendment Law 12-13 (1999) ("definitional balancing generates *per se* rules or categories for future cases"). This point is as true for a categorical rule in "obscenity" or "incitement to violence" cases as it is for high-level policy disputes. *See Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio* 395 U.S. 444 (1969) (per curiam) (incitement to violence). For this reason, it is to be expected that the courts of appeals which have adopted the *Branti*-like categorical rule have explained the wholesale balancing of competing considerations that led them to adopt a *per se* rule. *See Flynn*, 140 F.3d at 48.[3]

For this reason also, the *Branti*-like categorical rule is not inconsistent with *Pickering* itself, and the petition does not contend otherwise. On the contrary, as the petition observes (at 9), *Pickering* expressly left open whether a *per se* rule would apply to the category of high-level policy disputes. Thus, the *Branti*-like categorical rule can be understood as an application of *Pickering* balancing to a certain category of cases.

This point, however, does not diminish the real conflict that exists between "wholesale" and "ad hoc" balancing. On the contrary, the First Amendment issue in this case represents a distinct fork in the road regarding the *Pickering* doctrine. Is it the task of a court, even in cases involving high-level policy disputes, to conduct a particularized inquiry into the strength of the agency's interests in making sure that a senior deputy shares the agency's policy positions? Or, instead, is there "no further weighing" of interests because "the balances have already been struck by the categorization of a worker as a policymaker"? *Kinsey v. Salado Independent*

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[3] The First Circuit's recent confirmation of *Flynn* in *Padilla-Garcia v. Rodriguez*, 212 F.3d 69, 79 (1st Cir. 2000), is fully consistent with this point.

School District, 950 F.2d 988, 998 (5th Cir. 1992) (en banc) (Higgenbotham, J., concurring specially).

As their opinions clearly reveal, the courts of appeals are sharply divided on which path to take at this fork in the *Pickering* road. The Sixth Circuit's decision here, by requiring a particularized showing of disruption in a case involving a high-level policy dispute (App. 45a-46a), plainly shows the problem of going down one fork in this road rather than the other. Accordingly, this Court should grant certiorari here to settle which of these two different directions is correct.

II. The First Amendment question is properly before this Court.

Johnson argues (Opp. 12) that the *Branti*-like categorical rule was not specifically raised below. But as this Court's decisions make clear, as long as a party advances a claim or a defense below, the party as a petitioner here may "make any argument in support of that claim [or defense]; parties are not limited to the precise arguments they made below." *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 120 S. Ct. 2180, 2187 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). There is no dispute that Johnson's First Amendment claim is predicated on this Court's decision in *Pickering*; nor is there any dispute that petitioners challenged in both lower courts the validity of Johnson's *Pickering* claim. Petitioners thus may press here the specific subsidiary argument that *Pickering* claims categorically fail when brought by high-level officials complaining about a policy dispute.

Nor is fact-finding needed to resolve the question presented. As Johnson's own complaint makes plain, he was the University's senior officer for personnel matters, reported directly to the President, and was in charge of implementing the University's affirmative action policies (App. 93a); and (by his account) he was discharged

because of his vociferous "battle" with the President concerning how best to implement those policies (App. 97a). The whole purpose of the *Branti*-like categorical rule is that, when a case involves a policy disagreement between an agency head and an immediate subordinate, it would be inappropriate to submit this high-level policy dispute to judicial fact-finding, and instead the First Amendment challenge is properly dismissed for failure to state a claim. *See, e.g., Hall v. Ford*, 856 F.2d 255, 263 (D.C. Cir. 1988) (affirming Rule 12(b)(6) dismissal because it is "self-evident" that "[h]igh-level officials must be permitted to accomplish their organizational objectives through key deputies who are loyal [and] cooperative").

Thus, the First Amendment question presented in the petition is a pure question of law and, as such, is ripe for resolution by this Court on the record in this case. The pros and cons of the *Branti*-like categorical rule have been well-ventilated by the many circuit opinions to have addressed this purely legal question. *See Hall*, 856 F.2d at 262-265; *Flynn*, 140 F.3d at 46-48; *Lewis*, 165 F.3d at 162-163; *Warzon*, 60 F.3d at 1237-1240; and other opinions cited in these cases. The choice between "wholesale" and "ad hoc" balancing is starkly posed, given the Sixth Circuit's decision to require "ad hoc" balancing here. Consequently, resolution of the sharp circuit split on this important First Amendment issue is appropriate at this time.

III. This Court should review the Sixth Circuit's holding that advocacy of affirmative action is, by itself, protected under Title VII.

A. The second question presented by the petition is whether Title VII protects advocacy of affirmative action, as the Court of appeals held. Johnson makes no effort to defend this ruling on its merits. Instead, he endeavors to oppose certiorari by arguing that his dispute with the University and its President

concerned not only his advocacy of increased efforts at affirmative action, but also what he perceived at the time to be discriminatory practices in violation of Title VII. *See* Opp. 2, 23. As the petition details (at 19-20 & n.16, n.17), however, Johnson made no such claim in his complaint or in his response to the University's motion for summary judgment; indeed, the district court specifically observed that Johnson never protested that any hiring decision by the University "was itself a violation of Title VII." (App. 73a).[4]

To the contrary, both the district court and the court of appeals specifically decided the question whether advocacy of affirmative action, by itself, is protected by Title VII (or Section 1981, which for this purpose is co-extensive with Title VII). Tellingly, both courts used identical words to describe the Title VII issue that Johnson put before them: "Specifically, Plaintiff alleges that Defendants discriminated against him because of his efforts to ensure that the University complied with its affirmative action policies [known as the A-900 process]." App. 15a (court of appeals), 70a (district court).

While the district court answered this question in the negative, App. 73a, the court of appeals (over Judge Kennedy's dissent) reached the opposite conclusion. App. 28a. Thus, far from being "theoretical" (Opp. 2), the Title VII question presented in the petition is precisely the question decided by both courts below, and presented by Johnson himself. Moreover, to the extent that the Sixth

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[4] In particular, Johnson made no mention of the President's alleged comment that he would refuse to consider hiring a black provost, upon which Johnson now places special emphasis. If Johnson had then viewed his case as involving opposition to "blatant discrimination," as he now claims (Opp. 2), this alleged incident would have been front and center. Yet it is altogether absent from Johnson's own description of the case, which instead told the district court that "[t]his case stems from Mr. Johnson's efforts to vindicate the University's official affirmative-action policies" (App. 106a-107a).

Circuit in deciding this question also muddled the distinction between what Title VII prohibits (discriminatory practices) and what it does not (lack of affirmative measures), review is warranted to clarify this distinction.[5]

As explained in the petition (at 21), and as Judge Kennedy argued in dissent (App. 50a), the Sixth Circuit's holding will have broad and unfortunate consequences. Indeed, in response to Judge Kennedy's dissent, the majority opinion acknowledges that, in its view, advocacy of an affirmative action plan is protected by Title VII "whether or not [that] plan [meets] the standard of *Croson*." App. 25a n.6. Thus, Johnson is incorrect in contending now that the Sixth Circuit's decision breaks no new legal ground (Opp. 27).

In addition to placing new and unwarranted restraints on employers, both public and private, the decision "creates a disincentive for employers," in the words of Judge Kennedy (App. 50), "to establish an affirmative action officer position" at all. Given the troubling implications of the Sixth Circuit's novel legal rule, and its divergence from the law in other circuits (*see* Pet. 21-22), this Court should review this issue concerning the extent of Title VII's proper scope.[6]

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[5] For example, the Sixth Circuit specifically mentions the University's decision not to advertise for a particular position (App. 35a). But Title VII does not require advertising, only non-discrimination, and thus Johnson's protest against this decision cannot count as opposition to a Title VII violation.

[6] Insofar as decisions of the D.C. and Seventh Circuit support the Sixth Circuit's interpretation of Title VII (*see* Opp. 24, 25 n.23), these cases widen the disagreement among the circuits on this problem of statutory interpretation, thereby increasing the need for this Court's review. Likewise, a recent Eleventh Circuit decision cutting the other way confirms that this problem is recurring and national in scope. *See Rice-Lamar v. City of Fort Lauderdale*, 2000 WL 1675595 (11th Cir. Nov. 8, 2000) (no Title VII, or First Amendment, violation when city dismisses affirmative action officer who insists on

B. This same justification for certiorari applies to the Sixth Circuit's holding that Johnson's decision to file an EEOC complaint was objectively reasonable. In sustaining Johnson's "participation" claim, the court ruled that Johnson "could have reasonably believed that he had a viable discrimination claim on the basis of his advocacy right as an affirmative action representative." App. 38a. The court's "participation" determination was thus predicated on its holding that advocacy for affirmative action is itself protected activity under Title VII. Accordingly, as explained in the petition (at 25), this aspect of the Sixth Circuit's decision creates the same inappropriate disincentives as the court's underlying Title VII holding. It should be reviewed as well. [7]

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implementing her own views of affirmative action, contrary to supervisors' directives).

[7] Although we see no need for the Court to review the content of Johnson's EEOC charge before deciding whether to grant certiorari on the Title VII issues raised in his complaint and decided by the courts below, should the Court wish to do so, we have lodged copies of this EEOC charge with the Clerk of this Court. (An examination of that document would reveal no Title VII violation that Johnson allegedly opposed, but only the unspecified claim that "the selection process could have been better" for hiring the new Chief Operating Officer of the University Hospital.)

CONCLUSION

For these reasons, and those in the petition itself, the petition for a writ of certiorari should be granted.

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